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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re) Case No. 08-23603-D-7
)
) Docket Control No. WW-5
GUY TYRONE LYNN and JAMIE)
ARCHER LYNN,)
)
Debtors.) DATE: September 2, 2009
) TIME: 10:00 a.m.
) DEPT: D (Courtroom 34)

MEMORANDUM DECISION ON MOTION FOR
COMPENSATION AND REIMBURSEMENT OF EXPENSES

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

16 On July 24, 2009 Wolff & Wolff ("Counsel") filed its First
17 and Final Application for Attorneys Fees for Representation of
18 Debtors in Connection with Chapter 13 (the "Application"). Viola
19 Haviland ("Haviland"), a creditor herein, and the United States
20 Trustee ("UST") each filed opposition to the Application. The
21 matter came on for hearing on the date and at the time indicated
22 above. After oral argument the matter was taken as submitted.
23 For the reasons set forth below, the Application will be granted
24 in part and denied in part.

I. BACKGROUND

26 On March 25, 2008 Guy Lynn and Jamie Lynn (the "debtors")
27 filed a petition for relief under Chapter 13 of the Bankruptcy
28 / / /

1 Code ("Code")¹. On that date the debtors also filed their
 2 schedules, statement of financial affairs and a Chapter 13 Plan
 3 (the "Plan"). Counsel has continuously represented the debtors
 4 in this case.

5 On May 6, 2008 Haviland filed an objection to the Plan (the
 6 "Objection"). The Objection is based, in part, on Haviland's
 7 assertion that the debtors' debt exceeded the Chapter 13 debt
 8 limit, that the Plan did not properly identify her claim, that
 9 the Plan was not the debtors' best effort, that the Plan was not
 10 feasible, and that the Plan did not satisfy the best interest of
 11 the creditors' test. At a hearing on June 17, 2008 the court
 12 sustained the Objection, and stated its findings of facts and
 13 conclusions of law orally on the record. In its finding the
 14 court stated the reasons the Plan was not confirmable.

15 As a result of the debtors' failure to timely file a new
 16 plan, on July 28, 2008 the Chapter 13 trustee filed a motion to
 17 dismiss the debtors' case. After hearing on the motion to
 18 dismiss, the court issued a conditional order requiring the
 19 debtors to file an amended plan no later than September 9, 2008,
 20 or their case would be dismissed (the "Conditional Dismissal
 21 Order").

22 The debtors filed an amended plan on September 9, 2008 (the
 23 "Amended Plan"), the last day allowed by the Conditional
 24

25 1. Unless otherwise indicated, all Code, chapter, section
 26 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
 1330, and to the Federal Rules of Bankruptcy Procedure, Rules
 27 1001-9036, as enacted and promulgated prior to the effective date
 28 (October 17, 2005) of the Bankruptcy Abuse Prevention and
 Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
 (2005).

1 Dismissal Order. The Amended Plan was virtually identical to the
2 Plan. Thus, the Amended Plan contained all of the same
3 impediments to confirmation that were contained in the Plan.

4 Predictably, on December 5, 2008 Haviland filed an objection
5 to the Amended Plan. Haviland also requested the debtors' case
6 be converted to a Chapter 7. Haviland's objection to the Amended
7 Plan, and her request to convert the case to Chapter 7, came on
8 for hearing on January 6, 2009.

9 At the January 6, 2009 hearing, the court sustain Haviland's
10 objection to confirmation of the Amended Plan. The court further
11 found that the debtors had engaged in unreasonable delay that was
12 prejudicial to creditors, and ordered the case be converted to
13 Chapter 7. The court stated its findings of facts and
14 conclusions of law orally on the record. At the conclusion of
15 this hearing, and after the court had made its ruling, Counsel
16 made an oral motion that the debtors' case be dismissed. Based
17 on the court's prior ruling converting the case to Chapter 7, the
18 court denied Counsel's oral motion to dismiss the case.

19 Notwithstanding the denial of the debtors' oral motion to
20 dismiss the case, immediately following the January 6, 2009
21 hearing Counsel filed a motion to dismiss the debtors' case. The
22 motion did not disclose any of the above procedural history.

23 On January 7, 2009, before the court entered its minute
24 order converting the debtors' case to Chapter 7, the court
25 inadvertently entered an order dismissing the debtors' case. On
26 January 12, 2009 the court vacated the order of dismissal and
27 entered an order converting the debtors' case to Chapter 7.

28 / / /

1 Through the Application, Counsel seeks approval of \$16,936
2 in fees and \$22.51 in expenses for services rendered in the
3 debtors' Chapter 13 case for the period of January 25, 2008
4 through January 8, 2009.

II. LAW AND ANALYSIS

6 Pursuant to section 330(a)(4)(B) of the Code, the court may
7 award compensation to a debtor's attorney in a Chapter 13 case
8 upon a showing that the services were necessary and benefitted
9 the debtor. In allowing compensation to debtor's attorney in a
10 Chapter 13 case, the court is to consider all the other factors
11 enumerated in section 330 of the Code.

12 Section 330 of the Code sets out the standard by which the
13 court should determine the reasonableness of fees under Section
14 329, and reasonableness is determined by looking at the nature,
15 extent and value of the services rendered. See In re Eliapo 298
16 B.R. 392, 401 (9th Cir. BAP 2003).

17 It is the applicant's burden to establish the value of the
18 services rendered. See In re Gianulias, 111 B.R. 867, 869 (E.D.
19 CA 1989). The initial burden under § 329(b) is on the attorney
20 to justify the compensation charged in connection with a
21 bankruptcy case. In re Jastream, 253 F.3d 438, 443 (9th Cir.
22 2001); In re Basham, 208 B.R. 926, 931 (9th Cir. 1997).

23 The court notes that under the Guidelines for Payment of
24 Attorneys Fees in Chapter 13 Cases Applicable in the Eastern
25 District of California (the "Fee Guidelines"), the allowed "opt-
26 in" fee for a Chapter 13 case is \$3,500 and \$5,000 for a business
27 case. Attorneys can "opt-out" of the Fee Guidelines; however,
28 there is a general presumption that the amount of attorneys fees

1 allowed in the Fee Guidelines for those who "opt-in," is
2 sufficient to cover the basic attorney services necessary in a
3 Chapter 13 case. See Fee Guidelines, para. 2 and 4.

4 The court recognizes that when an attorney "opts-out" of the
5 Fee Guidelines, the Fee Guidelines are only one factor to
6 consider in assessing the reasonableness of an attorney's fees in
7 a Chapter 13 case. Further, the court is prepared to compensate
8 an attorney on an hourly rate when the attorney has made a proper
9 showing under Section 330 of the Code. However, if an attorney
10 "opts-out" and seeks hourly fees, the fees must not only be
11 reasonable, but the services rendered must be necessary and have
12 provided benefit to the debtor.

13 Turning now to the Application. As Counsel has "opted-out"
14 of the Fee Guidelines, the court will consider the fees sought
15 under section 330 of the Code. Certain actions taken by Counsel
16 in this case support the conclusion that the case was
17 administered in a fashion to maximize delay to creditors.
18 Specifically, the court finds troubling that after the Plan was
19 denied confirmation, Counsel waited to the last day allowed by
20 the Conditional Dismissal Order before filing a new plan that was
21 virtually identical to the Plan. The debtors' filing of the
22 Amended Plan, which suffered from the same defects as the Plan,
23 and then proceeding to confirmation, appears to be nothing more
24 than a delay tactic. Another troubling aspect of the services
25 rendered by Counsel was the filing of the motion to dismiss the
26 debtors' case immediately following the January 6, 2009 hearing.
27 This was done after the court ordered the case converted to
28 / / /

1 Chapter 7, and after the court had denied Counsel's oral motion
2 to dismiss the case.

3 The debtors' Chapter 13 case was pending for some ten months
4 with little, if any, progress being made toward confirmation of a
5 plan. The administration of the case suggests intentional delay,
6 and a lack of good faith. These issues were squarely put in play
7 in the objections to the Application, yet Counsel failed to
8 address these issues by way of a reply, or otherwise. It is
9 Counsel's burden to demonstrate the reasonableness of the fees
10 sought, as well as the necessity of the services and the value to
11 the debtors of the services rendered. In this case Counsel has
12 failed to show that services rendered were reasonable, or that
13 Counsel's services were necessary or that they provided benefit
14 to the debtors.

15 Considering the totality of the circumstances, the court
16 will allow fees of \$6,000 for the period of March 25, 2008
17 through January 7, 2009. As this amount is 20% more than the
18 "opt-in" fee for a standard business case, this award is
19 generous. In addition, the court will allow costs of \$22.51 for
20 a total award of \$6,022.51.

21 Counsel is authorized to pay the court allowed fees and
22 costs of \$6,022.51 from its pre-petition retainer. The balance
23 of the retainer shall be paid to the Chapter 7 trustee within 15
24 days of entry of order.

25 A separate order will be entered consistent with this
26 memorandum decision.

27 Dated: SEP 21 2009

Robert S. Bardwil
Robert S. Bardwil
United States Bankruptcy Judge

Certificate of Service

I certify that on September 21, 2009 a copy of the **foregoing document** was mailed to the following:

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